

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1263-CR

Cir. Ct. No. 2007CF1441

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT ALAN SCHUMACHER, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
MICHAEL R. FITZPATRICK, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Robert Alan Schumacher, Jr., *pro se*, appeals from an order of the circuit court that denied his motion for plea withdrawal without a hearing. We conclude the motion is procedurally barred, so we affirm.

BACKGROUND

¶2 In 2008, Schumacher pled guilty to one count of operating while intoxicated (OWI) as a sixth offense with a minor child in the vehicle, a Class H felony contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(f) (2007-08).¹ Sentence was withheld and three years' probation was imposed. That probation was subsequently revoked and on October 15, 2009, Schumacher was sentenced to two and one-half years' initial confinement and three and one-half years' extended supervision.² Schumacher did not appeal his sentence after revocation.

¶3 In February 2015, Schumacher filed a motion under WIS. STAT. § 974.06, seeking to withdraw his plea. Schumacher was challenging the use of three OWI convictions from 1989 and 1993 to elevate his current offense to number six. At the time Schumacher pled to OWIs one through three, the law in Wisconsin provided a lookback period of five years for purposes of counting prior OWI offenses. *See* WIS. STAT. § 346.65(2)(b) (1989-90, 1991-92, & 1993-94). Later, the law was changed to create a lifetime lookback period. *See, e.g.*, WIS. STAT. § 346.65(2)(am)5. (2007-08). Schumacher's plea withdrawal motion essentially claimed that because the lookback period in 1989 and 1993 was five years, that period was necessarily a condition of his plea bargains such that

¹ The judgment of conviction includes an incorrect statutory reference to WIS. STAT. § 346.65(3m) (2007-08), for the minor-in-vehicle enhancer; the criminal complaint, however, properly identified § 346.65(2)(f) (2007-08).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The extended supervision term was later commuted to three years after the Department of Corrections informed the circuit court that three years' supervision is the maximum available for a Class H felony, *see* WIS. STAT. § 973.01(2)(d)5. (2007-08), and that the Department did not believe the minor-in-vehicle penalty enhancer applied to double a term of supervision.

subsequent counting of those pleas for penalty enhancement after five years constituted a breach of the plea agreements. Schumacher thus sought to withdraw his plea to his sixth OWI because a defendant has the right to enforcement of a negotiated plea agreement. *See State v. Howard*, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244.

¶4 The circuit court rejected Schumacher’s motion without a hearing, for four reasons. First, the circuit court noted that Schumacher had previously raised an issue regarding the lookback period in 2009, when it was rejected by circuit court order and Schumacher did not appeal. The circuit court thus labeled the current motion “not timely.” Second, according to the circuit court, Schumacher had not even alleged that there were prior plea agreements, much less produced transcripts or other evidence to show that the lookback period was part of the bargain. Third, the circuit court stated that Schumacher had not made any discernable legal argument in his motion. Finally, to the extent Schumacher was also alleging ineffective assistance of trial counsel, the circuit court concluded he had failed to identify any issue that a reasonable attorney should have raised. Schumacher appeals.

DISCUSSION

¶5 WISCONSIN STAT. § 974.06 permits some claims for relief to be brought after the time for appeal or other postconviction remedy has expired. *See* WIS. STAT. § 974.06(1). However, “[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion.” *See* WIS. STAT. § 974.06(4); *see also State v. Lo*, 2003 WI 107, ¶42, 264 Wis. 2d 1, 665 N.W.2d 756. Grounds for relief that have been previously adjudicated, waived, or not raised in a prior postconviction motion may not

become the basis for a subsequent motion absent sufficient reason. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Whether Schumacher's current motion is procedurally barred is a question of law we review *de novo*. *See State v. Tillman*, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574.

¶6 The circuit court effectively if not explicitly applied the *Escalona* procedural bar when it noted that Schumacher had previously raised the issue of the lookback period and the counting of prior OWI convictions. Schumacher does not address the circuit court's order in any fashion, much less present a sufficient reason for revisiting this issue.³ We cannot develop an argument for him. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82; *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

³ It is also fatal to the appeal that Schumacher fails to address the circuit court's conclusion that his motion lacked sufficient factual allegations to warrant relief. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (if a postconviction motion fails to allege sufficient material facts, whether to grant a hearing on the motion is committed to the circuit court's discretion). While we review the sufficiency of the motion *de novo*, *see id.*, we will not search the record to support an argument, *see Stuart v. Weisflog's Showroom Gallery, Inc.*, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127.

Further, the State asserts that the lifetime lookback period is retroactively mandatory. Schumacher has not responded to this argument. Arguments not refuted are deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶7 Because the issue of the lookback period was previously raised and adjudicated, Schumacher may not raise it again, no matter how he may repackage it.⁴ See *Escalona*, 185 Wis. 2d at 181-82; see also *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

⁴ In this case, Schumacher has attempted to repackage the topic under claim and issue preclusion, defectiveness of the complaint, personal jurisdiction, “judicial, equitable, and promissory [sic] estoppel,” and ineffective assistance of trial counsel.

